

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

Patrick Scanlon, Esquire
203 NE Front Street
Suite 101
Milford, DE 19963

William K. Scott, Esquire
Scott and Shuman, LLC
38017 Fenwick Shoals Boulevard
West Fenwick, DE 19975

Re: ***Wyoming Concrete Industries, Inc. v. Hickory Commons, LLC II***
C.A. No. 06L-07-031-RFS

Upon Defendant's Motion to Dismiss. Granted.

Submitted: October 11, 2006
Decided: January 8, 2007

Dear Counsel,

Pending before the Court is Defendant Hickory Commons II, LLC's Motion to Dismiss.
For the reasons set forth herein, the Motion is granted.

BACKGROUND

Hickory Commons II, LLC (hereinafter "Defendant"), is the owner and developer of a development known as "The Homestead", located in Millsboro, Delaware. Defendant retained Fresh Cut Lawn & Landscape Service, Inc. (hereinafter "Fresh Cut"), as a general contractor, to perform the site work at The Homestead. In the performance of its professional obligation, Fresh Cut ordered and obtained ready-mix concrete from Wyoming Concrete Industries, Inc. (hereinafter "Plaintiff") "for curbing and sidewalks."

Plaintiff first furnished materials and labor for The Homestead site on March 6, 2006. The final delivery occurred on March 29, 2006. Seven outstanding invoices now exist, totaling \$25,045.75. The materials provided were used exclusively for curb and sidewalk construction.

No materials or labor were used in the construction of any home or other structure. On August 24, 2006, Troy Oliver, Executive Vice President of projects for Mandrin Homes of Delaware and overseer of The Homestead project, signed an affidavit stating that as of that date, “no homes or parts of homes whatsoever have been erected on the land known as the Homestead.” Ex. B of Def.’s Mot. to Dismiss the Compl. Pursuant to Rule 12(b)(6). Indeed, Plaintiff admitted that no townhouses or individual houses “had their foundations poured” when suit was filed. Pl.’s Mem. in Opp’n to Def.’s Mot. to Dismiss the Compl. and Statement of Claim Pursuant to Rule 12(b)(6).

On May 30, 2006, Fresh Cut filed Chapter 7 Bankruptcy in the United States Bankruptcy Court. For this reason, Fresh Cut is not a party hereto. Plaintiff now seeks a mechanic’s lien against The Homestead property in the amount of \$25,045.75, with interest from March 29, 2006 at the rate of 10.75% per annum. Plaintiff also requests that costs be assessed against Defendant.

STANDARD OF REVIEW

The court must assume all well-pleaded facts or allegations in the complaint as true when evaluating a motion to dismiss under Rule 12(b)(6). *RSS Acquisition, Inc. v. Dart Group Corp.*, 1999 Del. Super. LEXIS 591, at * 8 (Del. Super. Dec. 30, 1999). The court will not dismiss a claim unless the plaintiff would not be entitled to recover under any circumstances that are susceptible to proof. *Id.* The complaint must be without merit as a matter of fact or law to be dismissed. *Id.* The plaintiff or complainant will have every reasonable factual inference drawn in his favor. *Ramunno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

“Dismissal is warranted where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.” *Hedenberg v. Raber*, 2004 Del. Super. LEXIS

310, at * 2-3 (Del. Super. Aug. 20, 2004), *citing Evans v. Perillo*, 2000 Del. Super. Lexis 243, at * 5-6 (Del. Super. May 26, 2000). “Where allegations are merely conclusory, ... (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.” *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000), *citing In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993).

DISCUSSION

The right to a mechanic’s lien is a creation of statute and “being in derogation of the common law, it must be strictly construed” *Dep’t of Cmty. Affairs & Econ. Dev. V. M. Davis & Sons, Inc.*, 412 A.2d 939, 942 (Del. 1980). “Strict compliance with the statute is required as powerful relief is afforded that was unavailable at common law.” *J.O.B. Constr. Co. v. Jennings & Churella Servs., Inc.*, 2001 Del Super. LEXIS 326, at * 4 (Del. Super. Aug. 9, 2001). Title 25 Section 2702(a) of the Delaware Code provides that anyone who has provided labor and/or material for the erection, alteration or repair of any *structure*¹ may seek a mechanic’s lien for nonpayment. Section 2702(b) lists various types of work for which liens may be obtained; among those listed is “paving”.

Section 2703 of Title 25 prohibits a lien from attaching where improvements are made to the land alone, unless a contract is signed by the land owner. Section 2703 reads, in relevant part:

No lien shall attach in case the improvements are to the land alone, unless a contract in writing, signed by the owner or owners thereof, setting forth the names of all parties to the contract and containing a description by the metes and bounds of the land to be affected and by a statement of the general character of the work to be done, and

¹ Section 2701(2) provides: “‘Structure’ includes a building or house.” The Delaware Supreme Court offered the following on the subject: “Since the term ‘house, building, or structure’ is now simply ‘structure’, we must give it the limited definitional meaning intended by the codifiers as it appears in the mechanic’s lien laws, not the broad dictionary meaning In normal day to day usage, structure is one of the broadest words in the English language, but here, under the statutory rule of strict construction we must apply it as it appears in the context of[] our mechanic[’s] lien laws.” *Pioneer Nat’l Title Ins. Co.*, 403 A.2d at 285.

of the total amount to be paid thereunder, and the amounts of the partial payments, together with the time when such payments shall be due and payable.

25 Del.C. § 2703

The parties acknowledge in their pleadings that there was no such contract and, consequently, a mechanic's lien cannot be imposed under Section 2703. Therefore, Section 2702 governs this action. Subsection (b) of Section 2702 provides that a mechanic's lien may be obtained in connection with labor performed and materials furnished for "paving". That language must, however, be read in conjunction with Delaware case law requiring paving be appurtenant to an existing structure if a plaintiff is to bypass the contract requirement of Section 2703. *See Pioneer Nat'l Title Ins. Co. v. Exten Assocs. Inc.*, 403 A.2d 283, 286 (Del. 1979) (distinguishing components of permanently situated or erected houses and buildings from improvements to land which may be made before, after or during the construction of the "structure" for which the land is to be used).

Plaintiff has not provided the address or description of any structure which is required under 25 Del. C. §2712(b)(7) for the imposition of a mechanic's lien. Furthermore, Plaintiff has not alleged any relationship between the paving work performed and an existing structure. A claim that The Homestead development, as a whole, amounts to a "structure" is the functional equivalent of an assertion that the whole is *more* than the sum of its parts. The Homestead is comprised of multiple lots, without any presently built homes or townhouses as envisioned in the deed attached as Exhibit A to the Complaint. The sum of all the empty lots does not equal a structure within the scope of what was intended by the drafters of Section 2702. The labor and materials provided by Plaintiff are not necessary or component parts of any structure, and consequently, a lien cannot be imposed under Section 2702.

CONCLUSION

Considering the foregoing, the Court concludes that the work performed by Plaintiff consisted of improvements made to the land alone which required a written contract, conforming to the requirements of 25 *Del. C.* §2703. For this reason, and the other reasons discussed above, Defendant's Motion to Dismiss is granted and judgment is entered against Plaintiff.²

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

² Technically, this is a summary judgment case. The fact that no homes or townhouses have been constructed is from record information, outside of the Complaint and its exhibits. However, this fact is not disputed, and only a question of law is presented. *See* Super. Ct. Civ. R. 12(b)(6), *see also*, Super. Ct. Civ. R. 56.